90-1811

No._____

Supreme Court, U.S.
FILED
APR 22 1991
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

RAYMOND and DORINA MATEYKO...Petitioner
v.
THOMAS FELIX, MICHAEL SERAFIN, THE CITY OF LOS ANGELES

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAW OFFICE OF MICHAEL WEISS
Michael Weiss, Esquire
2049 Century Park East
Suit # 1100
Los Angeles, California 90067
213-556-7996

Attorney for Petitioner

I. QUESTIONS PRESENTED FOR REVIEW:

(i) Was it a plain error of law for the District Court to send a special verdict form back to the jury for correction of discrepancies per Gallick v Baltimore & Ohio RR Co., 83 S Ct 659, 372 US 108. Alternatively, is there a conflict between the lower courts of appeal on whether a District Court has complete discretion to return a special verdict form to the jury for correction of discrepancies.

(ii) Will this Court exercise its supervisory power over lower federal courts and grant a new trial concerning the City of Canton, Ohio v Harris "deliberate indifference" issue because the plaintiff can adduce sufficient probative evidence to meet that standard and because that standard was enunciated

over one year after the District Court ruled on its directed verdict.

(iii) Was it a mixed error of law and fact for the Ninth Circuit for the court not to recognize the effect of objective prejudicial closing argument.

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V. REFERENCE TO OFFICIAL REPORTS: 913 F2d 744 and 924 F2d 824.

VI. SUPREME COURT JURISDICTIONAL GROUNDS: Rule 10(a) and (c) provides that this Court may exercise its discretion to review a case where there is a conflict between federal courts of appeal and when where is a conflict between a federal court of appeal and an applicable Supreme Court decision. In this case petitioner contend both grounds exist. Petitioner seeks to have the Court review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered on January 23, 1991. The Court has jurisdiction to review this matter pursuant to 28 USC 1254(1).

(a) Date of Judgment: September 6, 1990

(b) Rehearing Date: January 23, 1991.

VII. CONSTITUTIONAL PROVISIONS OR

STATUTES INVOLVED:

4TH AMENDMENT: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

14TH AMENDMENT: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 USC 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively tot he District of Columbia shall be considered

to be a statute of the District of Columbia."

CALIFORNIA PENAL CODE 148 [West 1987]: "Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, is punishable by fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

VIII. STATEMENT OF THE CASE: In Los Angeles on the afternoon of December 18, 1983, defendant officer Thomas Felix

stopped Mateyko for crossing a street without stopping for a red traffic light in violation of California Vehicle Code 21453(d). Mateyko verbally objected to issuance of a citation, and Felix radioed for assistance. Defendant officer Michael Serafin responded to Felix's request for assistance and used a Taser gun to subdue Mateyko. Mateyko was charged and ultimately convicted of a violation of California Penal Code 148.

Mateyko brought this action against the City and officers Felix and Serafin pursuant to 42 USC 1983, alleging Felix and Serafin violated Mateyko's federally protected rights by using unnecessary force. Mateyko asserted pendent state law claims for assault, battery, negligence and emotional distress. At the close of Mateyko's case in chief, the

court granted the City's motion for a directed verdict on Mateyko's action against the City and all Mateyko's claims against Felix and Serafin were submitted to the jury by special verdict. The jury found for defendants on all claims, except on Mateyko's claim against the City for negligent infliction of emotional distress. Mateyko appealed arguing, among other things: (1) the directed verdict for the City was improper (2) the special verdict form was improper and that the trial court erred in resubmitting the verdict to the jury to reconcile an ambiguity and (3) the conduct of defense counsel in questioning witnesses and in closing argument was unfairly prejudicial.

IX. DISTRICT COURT JURISDICTION: 28 USC 1343 and 28 USC 1331, insofar as

plaintiff alleged violation of constitutional privileges and immunities by state actors.

X. REASONS AND ARGUMENT FOR WRIT OF CERTIORARI:

(i) DEFECTIVE TRAINING:

The Ninth Circuits opinion at Part II, paragraph 3 states in part: "We agree with the district court that no reasonable jury could conclude these alleged inadequacies in training without more, established deliberate indifference to the rights of persons with whom the police came in contact." Petitioner contends that he should get a new trial to develop the Ninth Circuits "without more" statement. However the District Court made no such finding; rather at p. 7 lines 13-18 of the March 8, 1988 transcript it states: "I believe the

motion for directed verdict pertaining to the city should be granted, and it is granted. It seems to me that there has not been the requisite showing of any kind of a pattern or of a policy by the city... and it is simply not there." So the city is --that motion is granted." See Appendix part 4 which includes a sampling of Los Angeles Times articles. These articles are probative of a pattern of abuse or lack of training by L.A.P.D. police officers with Taser guns which accordingly should have put the Police Department on notice of problems and lack of training.

In the last paragraph of Part II the Ninth Circuit states "Nothing in the record suggests the City knew it was creating an unjustifiable risk to its citizenry and ignoring that risk as

required by City of Canton. The same must be said of the Citys failure to inform its officers of the exact voltage of a Taser or its precise effect upon the human body." As above-contended petitioner can further develop the record on this issue in a new trial, and will now point some other already-existing probative evidence regarding same.

The transcript of Michael Serafin at p. 29 lines 3-17 indicated that he had only 3 hours of Taser training and only fired the Taser gun 3 times during training and that he had no re-training. Trial counsel for Mateyko may have been trying to develop the **constitutional content** of the training program-but his line of questioning was cut off by the District Court as irrelevant. On a new trial counsel can re-develop this line of

questioning with appropriate instructions from this Court.

Dillenbeck v. City of Los Angeles (72 Cal.Rptr. 321, 69 Cal.2d 472) stands for the proposition that leeway into questioning employees about safety manual provisions should be allowed. Petitioner contends that Dillenbeck is an important case in resolving this Writ request, just as is the following cite.

> "The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." [I]t may happen that in light of the duties assigned to specific officers or

employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. FN10. For example, city policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need. FN11. The record indicates that city did train its officers and that its training included first-aid instruction. See App. to Pet.

for Cert. 4a. Petitioner argues that it could not have been obvious to the city that such training was insufficient to administer the written policy, which was itself constitutional. This is a question to be resolved on remand.

The final question here is whether this case should be remanded for a new trial, or whether, as petitioner suggests, we should conclude that there are no possible grounds on which respondent can prevail. See Tr. of Oral Arg. 57-58. It is true that the evidence in the record now does not meet the standard of s 1983 liability we **1207 have set

forth above. Whether respondent should have an opportunity to prove her case under the "deliberate indifference" rule we have adopted is a matter for the Court of Appeals to deal with on remand. Justice O'CONNOR, with whom Justice SCALIA and Justice KENNEDY join, concurring in part and dissenting in part. Where, as here, a claim of municipal liability is predicated upon a failure to act, the requisite degree of fault must be *395 shown by proof of a background of events and circumstances which establish that the "policy of inaction" is the functional equivalent of a

decision by the city itself to violate the Constitution. Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf Monell, imposing liability without regard to fault. Where a s 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their

citizens, the dictates of Monell are satisfied. In my view, it could be shown that the need for training was obvious in one of two ways. First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. As the majority notes, see ante, at 1205, n. 10, the constitutional limitations established by this Court on the use of deadly force by police officers present one such situation. The constitutional duty of the individual officer is clear,

and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue. Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. See, e.g., Fiacco v. City of Rensselaer, 783 F.2d 319, 327 (CA2 1986) (multiple incidents required for finding of deliberate indifference); Patzner v. Burkett, 779 F.2d 1363, 1367 (CA8 1985) ("[A]

municipality may be liable if it had notice of prior misbehavior by its officers and failed to take remedial steps amounting to deliberate indifference to the offensive acts"); Languirand v. Hayden, 717 F.2d 220, 227-228 (CA5 1983) (municipal liability for failure to train requires "evidence at least of a pattern of similar *398 incidents in which citizens were injured or endangered"); Wellington v. Daniels, 717 F.2d 932, 936 (CA4 1983) ("[A] failure to supervise gives rise to s 1983 liability, however, only in those situations where there is a history of wide-spread abuse.

> Only then may knowledge be imputed to the supervisory personnel"). The Court's opinion recognizes this requirement, see ante, at 11, and n. 10, but declines to evaluate the evidence presented in this case in light of the new legal standard." City of Canton, Ohio v Harris (109 S Ct 1197, 489 US 378, 103 L Ed2d 412)

In this case some relevant Los Angeles Police Department (hereinafter L.A.P.D.) policies may be found in its Manual at sections 1/240.05, 1/240.10, 4/216.22 and 4/707, copies of which at in part 4 of the Appendix herein. The Manual sanctions arrests for "interference" under Penal Code 148.

Penal Code 148 does not include interference; rather just obstructing, resisting and delaying. The California Legislature did specifically proscribe interfering in Welfare and Institutions Code 9732 (regarding W & I 9720 investigations), Labor Code 18854, Education Code 10902.5, Elections Code 29612, 29645, Code of Civil Procedure 872.130(c) and Penal Code sections 148.2, 169, 369i, 370, 402(b), 593, 593c, 626.8, 2772, and 2790.

The L.A.P.D. Manual directs police officers not to second guess the constitutionality of a statute such as Penal Code 148. Petitioner contends Penal Code 148 is substantially overbroad because no California Supreme Court has delimited its scope by excising from its sweep statements of free speech. Malley

v Briggs (106 S Ct 1092, 471 US 1124, 86 L Ed2d 271 held that no immunity exists for police officers who execute objectively defective warrants, and the same may be said of objectively defective statutes.

Under Sibron v New York, 88 S Ct 1889, 392 US 40, 20 L Ed2d 917, petitioner Mateyko requests permission to address the substantial overbreadth and unconstitutionality of Penal Code 148.

Petitioner contends that the L.A.P.D. use of force policy was unconstitutional as applied because it allowed potentially deadly force (Taser gun electricity) other than when a police officer has probable cause to believe the suspect poses an immediate threat of serious physical harm either to himself or others, per Tennessee v Garner (105 S

Ct 1694, 475 US 1, 85 L Ed2d 1). Petitioner contends that the Police Department was at fault in its training program because there was no instruction given to Officer Serafin or his class on how to safeguard the constitutional rights of suspects to be free from the use of excessive force, nor when to arrest under Penal Code 148 when free speech is involved.

Officer Serafins training record, found in the Appendix at part 4, shows no training on "Individual Constitutional Rights," nor "Constitutional Limitations on use of Deadly force," or the like. And it was physically impossible to cram into his 3 hour Taser class (which apparently just part of a larger "advanced officer school" training on constitutional rights of free speech and

freedom from use of excessive force. People react differently to electricity. It only takes 4 miliamps to kill a person if he is subjected to it long enough. Heart condition, weight, size, age, gender, drugs, etc., all are important variables in determining what is excessive electricity to a body, and a 3 hour class just cannot cover it all adequately.

Petitioner contends that the L.A.P.D.'s deficiency in training, supervising, and disciplining of its police officers actually caused Officer Serafins indifference to Mateykos constitutional rights to free speech and to be free from excessive force.

Officer Serafin could not recall who his teacher was nor anything about his Taser training class. A reasonable trier

of fact could conclude that the only thing he and his class learned was how to fire the weapon and reload it, taking into consideration that said training class also required the firing of the weapon, at some location. Serafins trial transcript at p. 27 line 24-25 states "The Taser gun has no sighting devices on it. You just align the top of the device with the main portion of the body." P. 29 lines 3-17 go on to indicate that Officer Serafin only had 3 hours of training and only fired it 3 times, and that he had no re-training. P. 30 line 9-17 indicates that the Taser gun - "its very inaccurate." Where did you aim it? "at the chest area" [however Mateyko was in fact hit in the testicles] ...while Mateyko was "in a sitting position." Shooting at the chest may infer defective

training because the heart is in that area; and, shooting a suspect sitting on the ground while 3 officers are on the scene may also indicate defective training as to when it is the appropriate time to use such a weapon, as contrasted with other control techniques. Page 34 line 4-5 state "It was my impression then that he stopped resisting. That's why I discontinued the charge." It is a fact that suspects on PCP have taken 24 bullets after a car accident and are still combative. To shoot electricity until the suspect stops resisting may well lead a juror to find defective training and excessive force. Because the Taser gun is "very inaccurate" a reasonable juror may conclude that its just like a lie detector test or an experimental drug. Both are too

inaccurate to be relied upon in the first place. Page 36 line 3-9 asked "How much voltage continues after shooting" and the response by Serafin was "Some amount of voltage will, I'm not sure how much." This again could lead the juror to believe that neither Serafin nor the class he sat with was properly trained. If Serafin, who presumably is an intelligent police officer cannot answer basic questions like this, the jury could infer that there are a lot of other police officers like him out there on the streets with defective training. The LA Times articles prove this to be true even today. At p. 64 line 14 Serafin states "I never got close enough to him for him to have been a physical threat to me." This statement indicates that Serafin may have been defectively trained as to when

to deploy the weapon, for it infers that as soon as a suspect interferes the Taser gun may be used to shoot 50,000 volts of electricity through him until he stops interfering, and there is no need to try less harmful or painful control tactics. At pages 25 line 16-25 and page 26 lines 1-11 Officer Serafin states that **L.A.P.D. policy** requires that he not physically interject himself in between a suspect and another police officer who are "tied up" in a combative situation.

L.A.P.D. Order No. 3 (see Appendix part 4 herein) dated February 3, 1983 states at p. 2 paragraph 3 "Tasers shall be issued to and be used only by offices who have completed the Departments TASER training program." Serafins In-Service Training Record does not specifically indicate such training was completed,

which may have lead a reasonable juror to believe that the L.A.P.D. was lax in supervision. At page 3 of said document in paragraph 3 it is stated under Field Supervisor-Responsibilities - item 4 - that they are to "ensure that all arrest reports, associated with the use of a TASER, are marked "Altercation-TASER" on the left-hand margin of the face sheet." The arrest report (see Appendix part 4 herein) did not bear any such notation, which again could lead a reasonable juror to infer that there may be deficient supervision.

If Mateyko was granted a new trial he would point out specifically just where Officer Serafins class training program was defective; and, he could point out to the jury the numerous and well known occasions when L.A.P.D.

officers used or abused Taser guns such as to put the Police Department on notice of abuse or defective training in this area. Most everybody in Los Angeles reads the Los Angeles Times including L.A.P.D. Chief Daryl Gates and his training and discipline staff. For any "pattern and practice" case the plaintiff needs a lost of statistics. Petitioner contend they already exist and can be readily gathered up in order to meet with the City of Canton, Ohio holding.

(ii) CONFLICT BETWEEN LOWER COURTS RE: SPECIAL VERDICT FORM INCONSISTENCIES

The Ninth Circuits opinion at Part III paragraph 5 states "We decline to follow the latter aspect of McCullum. If the inconsistency between special verdict answers is noticed prior to the dismissal of the jury, the district court has

discretion to resubmit the issue to the jury with a request for clarification." This paragraph also cites cases to support its opinion, and all in all indicates a conflict between appellate circuits on the issue. Petitioner contends this is a serious error, and is not consistent with the opinions of this Court and in particular Gallick v Baltimore & Ohio RR Co (83 S Ct 659, 372 US 108).

It is the trial judge himself who must resolve the discrepancies if possible, as petitioners Opening Brief to the Ninth Circuit pointed out.

(iii) PREJUDICIAL CLOSING ARGUMENT AT TRIAL

The Ninth Circuits opinion at Part IV paragraph 4 states "The trial court is in a far better position than we to gauge

the prejudicial effect of improper comments." Petitioner contends that the nature of the statements were per se objectively prejudicial. The following case indicates that mud-slinging is no new tactic for the L.A.P.D.

> "All of the objections were directed to the impropriety of the impeachment and all were overruled. 'By Mr. Daly: Q. Mr. Graves, have you ever been convicted of a felony? 'A. Convicted? No. 'Q. Did you ever plead guilty to a felony? 'A. No.' Counsel for plaintiff, Mr. Belli, objected. 'The Court: It's a proper question. Have you ever been convicted of a felony? You may answer that yes or no.

'The Witness: I've violated a probation, if that is a conviction; but behind the probation I was found not guilty, but I was put on probation, and a fine, which I did violate.' Further inquiry along these lines was postponed until the following morning, when the trial judge made this ruling: 'The Court: All of the testimony of this witness in reference to being convicted of a felony or being on probation is stricken from the record, and the jurors are to disregard it and treat it as though they had never heard of it. * * * 'Mr. Belli: Excuse me. Just a minute. Will your Honor,

respectfully, instruct the jury that the witness has not been convicted of a felony? 'The Court: The defendant (Sic, witness) has not been convicted of a felony. 'Mr. Belli: Thank you. 'The Court: He has been arrested. All other testimony in reference to this witness regarding arrest or felony is stricken from the record, other than the fact that he suffered an arrest.' After plaintiff's counsel objected to the judge's references to arrest and his motion for mistrial was denied, defense counsel proceeded to further cross- examine Graves. On recross-examination, the following colloquy ensued:

'Mr. Daly: Let the record indicate that this is for the purpose not of impeachment but for the purpose of bias, motive and prejudice.' Mr. Belli's objection was overruled. 'By Mr. Daly: Q. Mr. Graves, on April 4, 1959, were you arrested for statutory rape by the City of Los Angeles police officers?' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: Were you arrested on April 4, 1959, for statutory rape by the City of Los Angeles Police Department? 'A. Yes, I was. 'Q. And were you arrested on 11--13--59 for traffic warrants by the Los Angeles Police Department?'

Mr. Belli's objection was overruled. 'Q. By Mr. Daly: Were you arrested in 1961 for narcotics? 'A. Not that I recall.' Mr. Belli's objection was overruled and his motion for mistrial was denied. 'Q. By Mr. Daly: Were you arrested on June 27, 1961, by the Los Angeles Police Department for more traffic warrants? 'A. Perhaps.' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: October 14, 1963, were you arrested for more traffic warrants?' Mr. Belli's objection was overruled and his motion for mistrial was denied. 'The Witness: It's possible.' Mr. Belli's motion

for mistrial was denied. 'Q. By Mr. Daly: July 24, 1964, were you arrested for failing to appear on traffic warrants?' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: June 13, 1965, were you arrested for violation of 459 of the Penal Code, burglary? 'A. No.' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: On March 10, 1966, were you arrested for 459 P.C., charged with 484 Penal Code, petty theft?' Mr. Belli's objection was overruled. 'The Witness: Yes.' The rulings of the trial judge in the instant action permitted wholesale circumvention of the

language and policy of the foregoing sections of the Evidence Code.All of this was undertaken under the guise of suggesting bias of the witnesses against the police in general and Officers Kilgo and Rinehart in particular, but the effect was clearly to accomplish that which the Evidence Code precludes. The members of the jury were permitted--indeed encouraged--to disbelieve the testimony of Graves and Plankers because they were men of generally 'bad character' who had been 'in trouble' with the police." Grudt v. City of Los Angeles (86 Cal.Rptr. 465,

2 Cal.3d 575)

This Court has spoken similarly in Huddleston v United States 108 S Ct 1496, 485 US 681, 99 L Ed2d 771 and Green v Bock Laundry Mach Co., 109 S Ct 1981, 104 L Ed2d 559. Petitioner contends that an objective standard for reviewing prejudicial closing remarks as stated in Harrington v California 89 S Ct 1726, 395 US 250, should be utilized to find that such existed in the present case.

For the foregoing reasons, it is submitted that a Writ of Certiorari should issue to review the January 23, 1991 decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted

RAYMOND MATEYKO, Petitioner

By: Michael Weiss, Esquire

2049 Century Park East

Suite 1100

Los Angeles, California 90067

CERTIFICATE OF SERVICE

I, Michael Weiss, attorney for petitioner, state that I have this 22nd day of April, 1991, deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari, to the Honorable Richard Helgeson, attorney for the respondents, at his mailing address of 200 North Main St #1700, Los Angeles, California 90012, 213-485-0735. All parties required to be served have been served.

Michael Weiss

Michael Weiss, Attorney for Petitioner

(2)

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OCTOBER TERM 1990

RAYMOND and DORINA MATEYKO...Petitioner

v.

THOMAS FELIX, MICHAEL SERAFIN, THE CITY OF LOS ANGELES

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DORINA MATEYKO,)

Plaintiff,)

and)

RAYMOND MATEYKO)

Plaintiff-Appellant)

vs.)

THOMAS FELIX, MICHAEL SERAFIN)

THE CITY OF LOS ANGELES)

Defendants-Appellees)

_____)

Appeal from the United States District Court for the Central District of California David V. Kenyon, District Judge, Presiding

Argued and Submitted December 4, 1989-Pasadena, California

Filed September 6, 1990

Amended January 23, 1991

Before: James R. Browning, Arthur L. Alarcon and Warren J. Ferguson, Circuit Judges.

Opinion by Judge Browning

SUMMARY

Courts and Procedure/Attorneys' Fees

In an amended opinion affirming a district court Judgment, the court of appeals held that resubmission to the Jury of a special verdict to clarify issues on comparative negligence was not an abuse of the district court's discretion.

Appellant Raymond Mateyko was stopped by police officers for crossing a street against a red light. Mateyko resisted issuance of a citation and police radioed for assistance. A Taser gun was used to subdue Mateyko. Mateyko

was convicted of willfully and unlawfully resisting, delaying, and obstructing a police officer in the discharge of his duties. Mateyko brought suit arguing the officers violated his federally protected civil rights by using unnecessary force. Mateyko asserted pendent state law claims for assault, battery, negligence, and emotional distress. The court granted defendant's motion for a directed verdict on Mateyko's civil rights claims. The remaining state law claims were submitted to the jury by special verdict. The jury found for Mateyko only on his claim against the City for infliction of emotional distress. However, because Mateyko was found to be contributorily negligent his damage award was reduced.

[I] The court agreed with the district court that no reasonable jury

could conclude that Mateyko's alleged inadequacies in the training of police officers, without more, established deliberate indifference by the City to the rights of persons with whom police officers came in contact. [2] Failure to provide a more lengthy training program suggested at most negligence on the part of the City in miscalculating the amount of time necessary to adequately prepare its officers. Nothing in the record suggested the City knew it was creating an unjustifiable risk to its citizenry and ignoring that risk. [3] A trial court has complete discretion whether a general or special verdict is to be returned. This discretion extends to determining the form of the special verdict, provided the questions asked are adequate to obtain a jury determination of the

factual issues essential to judgment. In this case, the special verdict form, when considered with the instruction as a whole, fully and fairly presented to the jury the issues it was called upon to decide. [4] A trial court has the discretion to resubmit to the jury an issue for clarification. It was not an abuse of discretion to resubmit the special verdict questions to the jury in this case. [5] The trial court was in a better position to gauge the prejudicial effect of improper comments by counsel. The district court properly determined that any prejudice from improper remarks was corrected when counsel apologized to Mateyko before the jury and the jury received a curative instruction. [6] Mateyko was not entitled to attorneys fees. Mateyko was not a prevailing party

on the federal claim. Someone like Mateyko, who loses on his federal claim and recovers only on a pendent state claim, is not a prevailing party under the federal statute authorizing attorneys' fees.

COUNSEL

Michael Weiss, Los Angeles, California, for the plaintiff appellant.

Richard M. Helgeson, Assistant City Attorney, Los Angeles, California, for the defendants-appellees.

ORDER

The opinion filed September 6, 1990 is amended. A copy is attached. The Petition for Rehearing is denied.

OPINION

BROWNING, Circuit Judge:

Raymond Mateyko sued the City of Los Angeles (the City) and certain of its

police officers, asserting violations of his federal civil rights and various pendent state law claims based on alleged excessive use of force. Mateyko appealed the Judgment. We affirm.

I. In Los Angeles on the afternoon of December 18, 1983. defendant officer Thomas Felix stopped Mateyko for crossing a street without stopping for a red traffic light in violation of California Vehicle Code 21453(d). Mateyko resisted when Felix attempted to issue a citation, and Felix radioed for assistance. Defendant officer Michael Serafin responded to Felix's request for assistance and used a Taser gun to subdue Mateyko. Mateyko was charged and ultimately convicted of willfully and unlawfully resisting, delaying and obstructing a police officer in the

discharge of his duties in violation of California Penal Code s 148.

Mateyko brought this action against the City and officers Felix and Serafin pursuant to 42 U.S.C. s 1983, alleging Felix and Serafin violated Mateyko's federally protected rights by using unnecessary force. Mateyko asserted pendent state law claims for assault, battery, negligence and emotional distress. At the close of Mateyko's case in chief, the court granted the City's motion for a directed verdict on Mateyko's section 1983 claims. The remaining state law claims against the City and all Mateyko's claims against Felix and Serafin were submitted to the jury by special verdict. The jury found for defendants on all claims, except on Mateyko's claim against the City for

negligent infliction of emotional distress. Mateyko's damages on this claim were found to be $492,000. Mateyko was found to be 96% contributorily negligent, and the court entered judgment for Mateyko for $19,680.

Mateyko appeals, arguing: (1) the directed verdict for the City was improper; (2) the special verdict form was improper and the court erred in resubmitting the verdict to the jury to reconcile an ambiguity; and (3) the conduct of defense counsel in questioning witnesses and in closing argument was unfairly prejudicial. Mateyko challenges the award of costs below to defendants, and seeks attorney's fees on appeal.

II. Mateyko challenges the directed verdict. We review the trial court's ruling de novo, viewing the evidence in

the light most favorable to the nonmoving party and drawing all inferences in favor of that party. Donoghue v. Orange County, 848 F.2d 926, 932 (9th Cir.1987).

A municipality can be liable under section 1983 only if its policy or custom caused the constitutional deprivation complained of. Monell v Department of Social Servs., 436 U.S. 658, 690 (1978). Inadequate training can form the basis for municipal liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 109 S.Ct. 1197, 1204 (1989). "[The focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." Id. at 1205-06.

[1] Mateyko asserts officer

Serafin's "sufficient and undisputed trial testimony," coupled with "a few exhibits on the Monell issue," would have supported a jury verdict for Mateyko against the City on his section 1983 claim. Mateyko directs this court to the testimony of Serafin indicating officers receive approximately three to four hours of training in the use of Tazer guns and lack information as to the Tazer's voltage or its precise effect on the human body. We agree with the district court that no reasonable jury could conclude these alleged inadequacies in training, without more, established deliberate indifference to the rights of persons with whom the police came in contact.

[2] Viewed in a light most favorable to Mateyko, failure to provide a more

lengthy training program suggests at most negligence on the part of the City in miscalculating the amount of time necessary to adequately prepare its officers. Nothing in the record suggests the City knew it was creating an unjustifiable risk to its citizenry and ignoring that risk as required by City of Canton. The same must be said of the City's failure to inform its officers of the exact voltage of a Tazer or its precise effect upon the human body.

III. Mateyko objects that the special verdict form improperly required the jury to draw legal conclusions and in any event should not have been resubmitted to the jury to resolve an inconsistency in the jury's answers.

[3] The trial court has complete discretion whether a general or special

verdict is to be returned, and this discretion extends to determining the form of the special verdict, provided the questions asked are adequate to obtain a jury determination of the factual issues essential to judgment. R.H. Baker & Co. v Smith-Blair, Inc., 331 F.2d 506, 508 (9th Cir. 1964). In this case the special verdict form, when considered with the instruction as a whole, fully and fairly presented to the jury the issues it was called upon to decide.

In answering special verdict form questions, the jury indicated the City had negligently inflicted emotional distress upon Mateyko, but that neither Felix nor Serafin had done so. However, in response to a subsequent question regarding comparative negligence, the jury assigned 96% of the fault to Mateyko

and 4% of the fault to "Michael Serafin and City of Los Angeles." The court requested clarification. The jury replied it had intended to hold the City liable but to exonerate the individual officers on the ground that the City had been negligent in training the officers to use the Taser gun, but that the officers had acted in good faith.

Mateyko relies on McCollum v Stahl, 579 F.2d 869 (4th Cir. 1978), in support of the argument that resubmission to the jury was error. In McCollum, the jury returned special verdicts finding no liability as to a particular defendant, yet awarding punitive damages against him. The court held resubmission under those circumstances "was tantamount, in its effect, to a direction to the jury to find liability in order to warrant the

award of damages." Id. at 871. McCollum also held, however, that as a matter of law a special verdict submitted to a jury pursuant to Fed.R.Civ.P. 49(a) may not be resubmitted to clarify inconsistencies. Id. at 871-72.

[4] We decline to follow the latter aspect of McCollum. If the inconsistency between special verdict answers is noticed prior to the dismissal of the jury, the district court has the discretion to resubmit the issue to the jury with a request for clarification. Though Rule 49(a) does not explicitly provide for resubmitting inconsistent special verdict answers, neither does the rule prohibit it. Permitting the trial court in its discretion to resubmit inconsistent answers for clarification promotes both fairness and efficiency. Eg

Karl v Burlington N.R.R. Co., 880 F.2d 68, 72-73 (8th Cir. 1989); Santiago-Negron v Castro-Davila, 865 F.2d 431, 444 (1st Cir. 1989); Richard v Firestone Tire & Rubber Co., 853 F.2d 1258, 1260-61 (5th Cir. 1988); Auwood v. Harry Brandt Booking Office Inc., 850 F.2d 884, 891 (2d Cir. 1988). It was not an abuse of discretion to resubmit the special verdict questions to the jury in this case.

IV. Mateyko asserts the district court erred in denying Mateyko's motion for a new trial based on Deputy City Attorney Hernandez's allegedly improper and prejudicial remarks during the examination of Mateyko and Serafin, and in closing argument.

Hernandez allegedly made an improper reference to false police reports filed

by Mateyko. Mateyko complains that Hernandez's references to Mateyko's conviction for resisting arrest was an improper effort to attack Mateyko's credibility, in violation of the district court's order limiting admissibility of that conviction to prove facts necessarily decided against Mateyko and relevant to the instant action. Mateyko complains that Hernandez made further improper attacks on Mateyko's credibility and mischaracterized the testimony of an expert witness. Mateyko argues Hernandez made several misstatements of law in his closing, and that he made an improper and prejudicial reference to City Attorney James Hahn.

A new trial is warranted only if counsel's misconduct affected the verdict. Chalmers v City of Los Angeles,

762 F.2d 753, 761 (9th Cir. 1985). The district court's refusal to grant a new trial is reversed only for abuse of discretion. McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983).

[5] The trial court is in a far better position than we to gauge the prejudicial effect of improper comments. Kehr v Smith, Barney, Harris Upham & Co., 736 F.2d 1283, 1286 (9th Cir. 1984). The court determined any prejudice from improper remarks would be corrected if Hernandez apologized to Mateyko before the jury and the jury received a curative instruction. These steps were taken. In view of the limited record before us, we are unwilling to say the district court's denial of Mateyko's motion for a new trial was an abuse of discretion.

V. In a claim based on 42 U.S.C. s

1983 the court, "in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. s 1988. Mateyko challenges the court's determination that defendants are prevailing parties entitled to recover their costs. Mateyko argues the jury verdict in his favor on his pendent state claim makes him a prevailing party within the meaning of section 1988.

[6] Mateyko argues a litigant who succeeds in only some of his or her claims properly may be considered a prevailing party and be entitled to an amount of fees reasonable in relation to the results obtained, citing Hensley v Eckerhart, 461 US 424, 434 (1983). Hensley, however, involved a litigant with mixed state and federal claims who

prevailed on some of his federal claims. In this case, all Mateyko's federal claims were decided against him. All circuits that have considered the issue have held that a plaintiff, like Mateyko, who loses on his federal claim and recovers only on a pendent state claim is not a prevailing party under section 1988 and may not be awarded fees. Eg Finch v City of Vernon 877 F2d 1497, 1507-08 (11th Cir. 1989); McDonald v Doe 748 F2d 1055, 1057 (5th Cir. 1984); Gagne v Town of Enfield 734 F2d 902, 904 (2d Cir 1984); Reel v Arkansas Dept of Correction 672 F2d 693, 698 (8th Cir 1982); Luria Bros & Co v Allen 672 F2d 347, 357 (3d Cir 1982); Haywood v Ball 634 F2d 740, 743 (4th Cir 1980).

Carreras v City of Anaheim 768 F2d 1039 (9th Cir 1985) is not to the

contrary. In Carreras, we said: "When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under s 1988." 768 F.2d at 1050. In Carreras, however, the court of Appeals did not reach the plaintiff's federal claims, because the plaintiff prevailed on state constitutional grounds. See also, e.g. Gagne v Maher, 594 F.2d 336, 341 (2d Cir. 1979) (fee award proper when unnecessary to decide federal constitutional claim); Lund v Affleck, 587 F.2d 75, 77 (1st Cir. 1978) (case disposed of on statutory grounds only does not preclude fee award under s 1988). Where, as here, there has been a decision adverse to plaintiff on the section 1983 claim, section 1988 does not

authorize the award of attorney's fees.

Both the statutory language and legislative history of section 1988 support this result. "The statute plainly limits fee awards to 'the prevailing party' [in] any action or proceeding to enforce a provision of [section] 1983.'" Luria Bros., 672 F.2d at 357 (quoting section 1988). The House Report accompanying section 1988 specifically contemplates a fee award if a plaintiff prevails on a substantial pendent state claim, but the court declines to reach the section 1983 claim. "'In some instances . . . the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive.'" Reel, 672 F.2d at 698 (quoting H.R. Rep. No. 1558, 94th Cong.,

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

2d Sess. 4 n7 (1976)). In such a case the denial of fees would be unfair and would frustrate section 1988's purpose to encourage private parties to vindicate their federal civil rights. But this is not such a case. In this case "the district court did not avoid reaching the constitutional issue because the pendent claim was dispositive; it found that [Mateyko] had no constitutional claim at all." Id.

Other grounds for reversal urged by Mateyko involved no error or were harmless.

Each party shall bear its own costs on appeal.

LAPD Manual 240.05 RESPECT FOR CONSTITUTIONAL RIGHTS. No person has a constitutional right to violate the law;

neither may any person be deprived of his constitutional rights merely because he is suspected of having committed a crime. The task of determining the constitutionality of a statute lies with an appellate court of proper jurisdiction, not with an officer who seeks to properly enforce the law as it exists. **Therefore, an officer may enforce any federal, state, or local statute which is valid on its face without fear of abrogating the constitutional rights of the person violating that statute**. An officer who lawfully acts within the scope of his authority does not deprive persons of their civil liberties. He may within the scope of his authority make reasonable inquiries, conduct investigations, and arrest on probable cause. However, when an officer exceeds

his authority by unreasonable conduct, he violates the sanctity of the law which he is sworn to uphold.

240.10 USE OF FORCE. In a complex urban society, officers are daily confronted with situations where control must be exercised to effect arrests and to protect the public safety. Control may be achieved **through advice, warnings, and persuasion, or by the use of physical force**. While the use of reasonable physical force may be necessary in situations which cannot be otherwise controlled, force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances. Officers are permitted to use **whatever force that is reasonable and necessary** to protect others or themselves

from bodily harm.

216.22 CRIMES AGAINST POLICE OFFICER CASES INVOLVING LOS ANGELES POLICE DEPARTMENT OFFICERS-REPORT PROCEDURES. When an on-duty Los Angeles Police officer or firefighter is the victim of an assault, misdemeanor battery, or **interfering** and booking is recommended, the arresting officer shall:

Complete an Arrest Report, Form 5.2, utilizing the combined crime and arrest format.

Note: A Preliminary Investigation Report, Form 3.1, shall be utilized only when a suspect is not in custody.

Have all reports approved and distributed in the Area of occurrence.

707. CRIMES AGAINST POLICE OFFICER CASES INVOLVING LOS ANGELES POLICE DEPARTMENT OFFICERS. When an on-duty Los Angeles

police officer or firefighter is the victim of an assault, misdemeanor battery, or interfering, the assigned detective from the Area occurrence shall:

Conduct a follow-up investigation with the arrestee, involved officers, witnesses and the officer who advised booking.

Report the results of the investigation on a Follow-Up Report Form 3.14.

Note: The Follow-up Report shall be used to clear the crime when appropriate (5/3.14-10).

Present the case to a Deputy City Attorney for filing.

Exception: When the investigation fails to substantiate the elements of a crime, release the prisoner pursuant to 849(b)(1) PC with the approval of the

investigating officer's supervisor or detective division watch commander.

Obtain warrants for suspects not in custody in the same manner as for felony suspects (4/725. 10).

Complete an Investigator's Final Report, Form 5.10 on each arrestee.

IN-SERVICE TRAINING RECORD FOR SERAFIN, MICHAEL

SER#:16927 RANK: PO 2 AREA: CENT

DATE	COURSE TITLE	HOURS
03/31/86	STANDARDS & PROCEDURES REGARDING DOMESTIC VIOLENCE	000
01/17/86	WEIGHT TRAINING	002
07/13/83	MDT SCHOOL	008
06/13/83	ADVANCED OFFICER SCHOOL	024
08/05/80	SIDE HANDLE BATON TRAINING	008
11/19/79	HEROIN ADDICT IDENTIFICATION SCHOOL	008

10/22/79 PCP SCHOOL 008

05/11/78 SHOOTING POLICY SEMINAR 004

10/17/77 ADVANCED OFFICER CIVIL DISTURBANCE 024

PREPARED BY TMS, TRAINING DIVISION ON 01/29/87

PAGE 8 Rank (R) Database

Mode R 5 OF 24 LATIMES P

35-YEAR-OLD SUSPECT DIES AFTER POLICE SUBDUE HIM WITH TASER

LOS ANGELES TIMES (LT) - THURSDAY August 29, 1985 Edition: Southland Edition Section: Metro Page: 3 Pt. 2 Col. 1 Word Count: 194

TEXT: A 35-year-old man died at County-USC Medical Center about three hours after Los Angeles police used electronic Taser guns to subdue him, investigators reported Wednesday.

It was the fourth death of someone struck with a Taser gun dart fired by Los Angeles Police in the last two years.

In the three previous cases, the deaths were attributed to heart failure. In one of those three, the coroner's office said, the Taser's high-voltage shock may have contributed to the man's death.

In the case reported on Wednesday, the cause of death of the man, whose name was withheld pending notification of relatives, was not immediately determined.

James DeSimone, president of the firm that manufactures Taser guns, said he was "quite sure" that none of the deaths was caused by the devices.

"They're designed so that won't happen," he said.

Still Applicable

Los Angeles Police Chief Daryl F. Gates, in a statement released last April and said to be "still 100% applicable," noted that the Taser had been employed by his department more than 1,000 times over a 4 1/2-year period without a single death attributed directly to its use.

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MAN, TARGET OF POLICE TASERS, DIES AT HOSPITAL

LOS ANGELES TIMES (LT) - THURSDAY
August 29, 1985

By: ERIC MALNIC; Times Staff Writer

Edition: Home Edition Section: ONE Page: 27 Pt. 1 Col. 6 Word Count: 331

TEXT: A 35-year-old man died at

County-USC Medical Center Tuesday about three hours after Los Angeles police used electronic Taser guns in an attempt to subdue him, investigators reported Wednesday.

Police said they were called to an apartment house on New Hampshire Avenue by residents who complained that a fellow tenant had been acting strangely --kneeling in a hallway, stabbing at the carpeting.

Officers said they found the man sitting on the front lawn, wearing a pair of swimmer's goggles, frothing at the mouth and jabbing at the lawn with a kitchen knife in one hand and a screwdriver in the other. The man was ordered repeatedly to drop the weapons "but appeared oblivious to the officers' presence," Police Lt. Charles Higbie

wrote in his report. Higbie said the officers, suspecting that the man was under the influence of narcotics, decided to employ their Taser guns, devices that fire a barb that stuns the subject with a presumably non-lethal 50,000-volt charge.

Did Not Appear Effective

One officer fired his device at the suspect twice, "but it did not appear that the barbs penetrated the clothing or that the electrical charge was effective," Higbie said. The lieutenant said a second officer fired another Taser shot, but "once again, the effects were minimal."

The officers then knocked the weapons from the man's hands with their batons, subdued him manually, handcuffed him, bound his legs with nylon restraint

cord and placed him in the back seat of a patrol car. The suspect exhibited unusual strength, Higbie said, snapping the leg restraints, which had to be reapplied.

After psychological evaluation at the Police Department's headquarters one man was taken to the medical center's psychiatric ward. About half an hour later, the man complained of difficulty breathing and was transferred immediately to the emergency ward, where he died.

A preliminary autopsy report is expected today, according to the coroner's office.

The dead man's identity was withheld pending notification of relatives.

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THE REGION LOS ANGELES TIMES (LT) - FRIDAY May 24, 1985

Edition: Home Edition Section: ONE Page: 2 Pt. 1 Col. 5 Story Type: Brief Word Count: 134

TEXT: A man who died after receiving a shock from a Los Angeles police Taser gun six weeks ago already had a heart condition and was under the influence of PCP at the time he received the shock, according to coroner's spokesman Bill Gold. Toxicological tests showed that Cornelius Garland Smith, 35, died from a combination of medication he was taking for the heart condition, the PCP and the electric shock, Gold said. Smith, of Los Angeles, was found writhing on the ground and screaming at 110th Street and Avalon Boulevard on April 11. Officers said that when they approached, Smith jumped up,

began break-dancing and kicking the side of their patrol car. They gave him a shock from the Taser gun, which is designed to stun people who are violent in resisting arrest.

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PARTNER USED STUN GUN ON SUSPECT, FIRED OFFICER SAYS

LOS ANGELES TIMES (LT) - THURSDAY

November 26, 1987

By: RICHARD HOLGUIN; Times Staff Writer

Edition: Home Edition Section: Metro

Page: 3 Pt. 2 Col. 1 Word Count: 594

TEXT: A former Huntington Park police officer denied Wednesday that he used an electric stun gun to torture a teen-age burglary suspect but testified

that he believed his partner had touched Jaime Ramirez with the device.

Robert Rodriguez said he stood back and listened to moans of pain as his co-defendant, former Officer William J. Lustig, leaned over Ramirez.

"It was like a painful moan, someone who was in pain," Rodriguez testified in Los Angeles Superior Court. "All you could hear Mr. Ramirez saying (was), 'No, sir. Please, sir."

Rodriguez, 26, and Lustig, 32, each are charged with a count of felony assault causing "great bodily harm" and a misdemeanor count of inhumane treatment of a prisoner. Both were fired from the Police Department as a result of the incident. They have been free on their own recognizance.

Testimony Called Tainted

Richard A. Levine, Lustig's attorney, has maintained throughout the trial that Lustig never used a stun gun on Ramirez and that the testimony of other key witnesses is tainted by their involvement in the incident.

"If there was an affirmative act of injury upon Ramirez, I believe the evidence indicates it was not my client, but Officer Rodriguez," Levine said.

The charges stem from an interrogation of Ramirez, 18, shortly after 4 a.m. on Nov. 30, 1986. Officer Eric Ault had arrested Ramirez on suspicion of car burglary after he found stereo equipment in a paper bag the teen-ager was carrying.

Ramirez told the jury last week that Rodriguez shocked him three times on his upper left leg with the stun gun before

Lustig took the device and shocked him four times. Ramirez told the officers at the scene that he had bought the equipment for $25. But later at the police station, he admitted to another officer that he had stolen it.

'I Saw the Stun Gun'

Rodriguez testified that he was standing about six feet away when Lustig leaned in toward Ramirez, who was in the back seat of Ault's car with his hands cuffed behind his back. Rodriguez said at first that he thought Lustig was beating or grabbing Ramirez in a painful way but later deduced that Lustig had severely stunned the teen-ager.

The former officer said he never saw Lustig actually touch the stun gun to Ramirez. After about a minute, Lustig moved away from the car, raised his arms

and said Ramirez apparently was telling the truth, Rodriguez testified.

"I saw the stun gun in his right hand," Rodriguez testified.

Rodriguez was asked why he made no effort to stop what he thought was abuse of the prisoner. "Basically police officers don't interfere with other officers," said Rodriguez. He added, however, that he could not justify his inaction.

Code of Silence

Rodriguez said he did not report the incident to his superiors because "I didn't want to be the one to go rat on an officer." Rodriguez said officers are bound by a code of silence borne from the fact that they may have to rely on each other in a life-threatening situations someday.

Rodriguez also admitted that he asked Ault to leave him out of any reports of the incident. Rodriguez said he feared he would be fired "not for what I did, it's what I didn't do."

But Deputy Dist. Atty. James E. Koller challenged that account during cross-examination.

"You didn't want to be there because you were directly involved in what happened. Isn't that correct?" Koller said. Responded Rodriguez: "No sir, not directly involved."

DESCRIPTORS: POLICE BRUTALITY; TASER GUNS; WITNESSES; LOS ANGELES POLICE DEPARTMENT; POLICE MISCONDUCT

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Police Documents Disclose Beating Was Downplayed Investigation: Highway Patrol officers say they were 'shocked' at the level of violence used by police. Reports studied by grand jury add detail to the King incident.

Los Angeles Times (LT) - WEDNESDAY March 20, 1991 By: RICHARD A. SERRANO; TIMES STAFF WRITER

Edition: Home Edition Page: 1 Pt. A Col.5

Word Count: 2,382

TEXT: Unaware that they had been videotaped, Los Angeles police officers and supervisors downplayed the level of violence used to arrest Rodney G. King by claiming that he suffered only cuts and bruises "of a minor nature," according to internal police documents reviewed by The Times.

In contrast, three California

Highway Patrol officers who watched how the police officers attacked King were so "shocked" at the brutality that they took note of the officers name tags.

"I didn't see any need to hit him with a baton," CHP Officer Melanie Singer later told investigators.

These conflicting accounts of the March 3 incident in Lake View Terrace are contained in hundreds of pages of confidential police reports, witness interviews and other official materials collected by investigators and studied by the Los Angeles County grand jury, which indicted a sergeant and three officers last week.

The documents lend substantial new detail to the early morning arrest that prompted allegations that the beating fits a pattern of abuse by Los Angeles

police officers and has spurred calls for the resignation of Chief Daryl F. Gates.

Central to the case against the officers is an amateur videotape of the beating that has been telecast nationwide. Contrary to what police officers initially reported about King's arrest, the 25-year-old parolee from Altadena was struck up to 56 times. His doctor says he suffered a dozen broken bones.

The Times, which gained access to the grand jury records, found: * Sgt. Stacey Koon, the lead Police Department supervisor at the scene, reported that although the officers repeatedly struck King, the man's injuries appeared to be light.

In his daily report, filed before his shift ended that day, he wrote:

"Several facial cuts due to contact with asphalt. Of a minor nature. A split inner lip. Suspect oblivious to pain."

Koon also stated that the officers "delivered a torrent of power strokes, jabs, etc., to arms, torso and legs. . . . Taser (a Police stun gun) going the entire time. Finally wore suspect down."

* In Use of Force reports submitted by Koon and Officers Laurence M. Powell and Timothy Wind, they listed King's injuries as only "contusions and abrasions."

They also marked boxes on the Use of Force Reports stating that King "attacked officers," "continued some resistance" and "increased (his) resistance."

In fact, the videotape shows that King is often in a defenseless position as the officers circled and hit him

repeatedly.

* Although Koon has been sharply criticized for allowing the beating to get out of hand, CHP Officer Singer told investigators that one Los Angeles police officer grabbed Powell's arm to stop him after the first few blows were struck. She said Koon yelled at Powell: "Stop! Stop! That's enough!" The beating momentarily ceased, but then resumed.

* On the day after the arrest, Sgt. Steven Flores of the Foothill Division was contacted by Paul King, who said he wanted to file a brutality complaint on behalf of his brother, Rodney.

Flores, in a report about his conversation with Paul King, said King told him there might be a videotape of the arrest, and that the tape would back up his contention of police abuse.

Flores told Paul King that if he found the tape, "call us back and release it to the LAPD."

The sergeant then wrote: "According to the reports, physical force was used in arresting (Rodney) King, but the force was justified. No further action is recommended until the results of the use of force investigation are reviewed and evaluated, and unless additional evidence, such as a videotape or witness statement, is obtained."

His report also notes that nowhere in the police reports of field interviews, watch commander's log or sergeant's log is there any mention that King had two friends with him in the car when they were stopped for speeding.

* Higher up the chain of command, a lieutenant also backed the conclusions

that only a small amount of force was used to subdue King. Lt. P. J. Conmay, who was Foothill watch commander on March 3, wrote that when Koon's Taser gun failed to faze King, "he was ultimately subdued after several baton strikes."

In reviewing these reports, the grand jury decided to indict Koon, Powell, Wind and Officer Ted Briseno on charges of assault with a deadly weapon and unnecessarily beating a suspect under color of authority. Koon and Powell were also charged with filing a false police report.

Koon faces an additional charge of being an accessory after the fact in what Dist. Atty. Ira Reiner has called a "cover up." Reiner has not elaborated. The grand jury investigation into the conduct of other officers is continuing.

Once King was arrested and Koon was back at the police station, the sergeant reflected on the difficulties officers had in controlling King.

"Always have a backup plan with a use of force," Koon wrote in his daily report. "It doesn't always work the way you're trained. Taser doesn't always immobilize. PR24 (the police baton) doesn't always cripple, etc., if you don't have a frame of reference.

"Officers tend to panic when things don't work the way they're supposed to," he added. "A backup plan prevents panic, and it don't hurt to have lots of backup, especially with PCP users."

Koon was invited by a supervisor to share his thoughts at a future station roll-call meeting.

Dr. Antonio Mancia, an emergency

room physician who examined King shortly after the incident, determined that there was "no clinical evidence" that King had taken drugs.

The three CHP officers at the scene came away shocked at the level of violence used on King. Their dismay was heightened when they later viewed the videotape on a television broadcast.

"It reminded me of a monster movie, where the monster gets shot and still is coming at you," said CHP Officer Tim Singer, describing the repeated blows to King.

Another CHP officer, Gabriel Aid, said he arrived after King was already hogtied. Aid said he was asked by one Los Angeles police officer, "Did you get any blood on your hands?"

The Singers, a husband-and-wife team

riding in a two-officer car, first noticed King when he and two passengers were driving on Interstate 210 at what Melanie Singer estimated were speeds of up to "100 miles an hour." She said King refused to stop, even after her husband advised him over their car bullhorn: "Pull over to the right. We won't hurt you."

Los Angeles police officers joined the pursuit, which came to an end in the 11700 block of Foothill Boulevard in Lake View Terrace.

Melanie Singer said that when King got out of the car, he first appeared jovial, smiling, laughing and dancing. At one point, he grabbed his buttocks and paraded in front of them, she said. He also appeared "heavily intoxicated" and "seemed very strange." As she approached

King, she said Koon told her, "No, no. Get back. We'll handle."

She said Koon twice shot King with the stun gun, and King stumbled to the ground.

"Officer Powell ran up and struck the suspect on the right side of his head with his baton, " she told investigators. "The suspect clasped his hands to his face and screamed with pain. He was bleeding. Powell then struck him five to six more times in rapid succession in the head and neck area."

She also described the blows as "causing his face to split."

"Mr. King appeared to be less resistive," she recalled. "I considered him disabled."

At that point, she said, none of the Los Angeles police officers gave King any

instructions on what they wanted him to do. "I asked Sgt. Koon if he had called for an ambulance and he said, 'No, not yet,' that he will or 'We're in the progress,' or something to that effect," she said.

At the scene, according to one of the CHP reports, Aid suggested to the Singers that they copy the names off the identification tags of all the police officers there.

The Singers said they then turned their backs to King so they could keep watch on King's passengers.

Later, the CHP officers said they were shocked when they saw the subsequent 50 baton blows that were captured on the videotape. They said they were unaware that the beating was continuing.

"I definitely was not a witness to

what I saw on TV," Melanie Singer said. "I was shocked when I saw it on TV because I never saw that (part of the beating) happen at the scene."

The statements also differ on whether King actually threatened the officers.

Two nearby residents, along with Paul Beauregard, a Los Angeles Unified School District police officer, recalled that King acted aggressively toward the police when he got out of the car.

"Mr. King was fighting and kicking while on the ground," Beauregard told investigators.

"Mr. King's fists were clenched and he had his hands at shoulder height," said area resident Dawn Davis. "He was getting ready to fight with an officer."

But others disagreed.

"The subject did not display any aggressive behavior," said Josie Morales, a resident. "In fact, he appeared to be passive."

King's two passengers, Bryant Allen and Freddie Helms said that although they got out of the other side of the car, they could tell from their friend's screams that he was under attack.

Allen said that during the car pursuit, he repeatedly urged King to slow down, to no avail. King, he said, "must have gone into shock, because he continued driving."

Allen said the three of them had not injected drugs, but each of them had consumed 40 ounces of Old English 800 malt liquor.

As Allen lay on the ground, he said he could hear "whacking sounds" coming

from the other side of the car. The whacks lasted for three to four minutes, he said. "It sounded as if bones were being broken or someone was receiving a busted skull," he told investigators.

At one point, he said, a Los Angeles police officer jeered out at him and asked: "Do you want to be like your homeboy."

Helms said he was asleep in the car, and woke up when they came to a stop after the chase. After they got out of the vehicle, Helms said he turned to look at King when an officer suddenly struck Helms on the side of his head with what felt like a baton.

"The blow to the head resulted in bleeding, which ran over to the left side of the head," Helms told investigators. The report also said Helms "got blood on

the collar of his shirt."

As the police officers were leaving, Helms said, he asked for assistance on how to get home to Altadena because he did not know exactly where he was. "He was told by the officers that they had additional calls and could not help him."

At Pacifica Hospital, the CHP officers assumed they would retain jurisdiction of the case because it began with a chase on the freeway. However, Melanie Singer said Koon had different ideas.

"When we arrived at the hospital, I started my paperwork," she said. "I walked over and was talking to King when Sgt. Koon came over and told me that they were going to handle the arrest because they had injuries."

In a March 5 interview at the

hospital, King tried to explain to investigators what had happened. "I know it wasn't a racial thing," he said. "But they didn't have to beat me this bad. I don't know what I did to be beat up."

At that time, King was unaware that just minutes before the beating, one of the officers had made an apparent racial slur about African-Americans.

On Tuesday, King-said through his attorney, Steve Lerman, that the police comment about "Gorillas in the Mist" was "clearly a racial slur."

"That's the way they think," King said. ". . . I fear the police. I fear them."

Although the four indicted officers are white, police sources said that at least one of the officers at the scene is black.

Lerman said he plans to file a lawsuit against the city of Los Angeles by the end of the week asking for $56 million in damages--$1 million for each blow King reportedly suffered. He said he also will file a damage claim against the state because at least one CHP officer can be seen in the videotape putting his nightstick back in its holster, or "ring."

"This man is every bit as culpable and guilty as the LAPD officers who stood there," Lerman said. He did not identify the CHP officer.

Lerman said King believes there may have been two sergeants at the scene, that the officers were trying to kill him and that when he was taken to jail, he kept thinking about his predicament: "Who's going to believe you? Who's going

to believe you?"

King also did not know that shortly before he was stopped by police, the Foothill officers participated in a special training session on the uses of force. Conmay wrote that the officers, huddled around a practice stand in the parking lot next to the police station, attended a "demonstration on specific uses and moves" of the police baton.

On Tuesday, the Police Department disclosed that 21 LAPD officers, not 15 as originally reported, were at the scene of the King beating. Department spokesman Lt. Fred Nixon said the 21 include the four who were indicted and possibly two in a helicopter. The officers arrived at different times and Nixon said the department is trying to determine who was there and why.

The new figures mean that at least 27 uniformed officers from various agencies were present: 21 from LAPD, four from the CHP and two from the Los Angeles Unified School District.

In addition to the four officers who were indicted, grand jury reports identify 13 other Los Angeles police officers at the scene. They are: David O. Avila, Tim E. Blake, Susan J. Clemmer, Paul R. Gebhardt, Christopher J. Hajduk, Ingrid Larson, David A. Love, Joseph F. Napolitano, Kenneth A. Phillippe, Danny Shry, Robert J. Simpach, Rolando Solano and Louis M. Turriaga.

Times staff writers Leslie Berger, Charisse Jones, Sheryl Stolberg and Tracy Wood contributed to this story.

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$11.3 Million Paid in 1990 to Resolve Police Abuse Cases

Los Angeles Times (LT) - FRIDAY March 29, 1991 By: JOHN L. MITCHELL; TIMES STAFF WRITER Edition: Home Edition Page: 3 Pt. A Col. 1 Word Count: 1,863

TEXT: The city of Los Angeles paid a record $11.3 million last year--more than

any other major city, except Detroit--to resolve lawsuits alleging police misconduct such as excessive force and false arrest, records and interviews show.

Los Angeles, with 8,300 police officers, recorded slightly higher legal payouts than New York City, which has three times that many officers. The city spent nearly twice as much on police-related litigation as Chicago, which has about 4,000 more officers than Los Angeles.

Detroit, with half as many police officers as Los Angeles, led the nation with $20 million in police-related payouts last year, The Times found.

The jury awards and settlements in Los Angeles averaged more than $350,000, much higher than those in most other

cities, records show. The city paid nearly $8 million on four of the 32 police suits cleared last year, including $3.2 million for suits arising from a controversial drug raid on apartments at 39th Street and Dalton Avenue.

"Lawsuits against government . . . have increased enormously," Los Angeles Police Chief Daryl F. Gates told the City Council last week. "Quite frankly there is a lottery mentality among juries now coming down with huge judgments. . . , I think that we have done a fine job, not that we can't do a better job."

After the beating of Rodney G. King early this month, federal and city officials began studying lawsuits against the Police Department to determine whether the incident is part of a pattern of excessive force against private

citizens. The Justice Department is reviewing about 100 lawsuits while conducting a broader investigation into the conduct of Los Angeles officers. And the City Council is examining lawsuits dating back five years.

In addition, Mayor Tom Bradley on Thursday asked the Police Commission to examine suits and the department's disciplinary practices "to see if the conduct of the department's leaders allows some officers to feel if they are above the law."

"It is clear from the Rodney King videotape and the number of lawsuits in the last five years that some officers feel that way," the Mayor said in a statement issued in response to a Times inquiry. "It frustrates me to learn when the city is held responsible for paying a

settlement in one of these cases."

Council members have raised questions about the rising cost of police-related litigation, which city attorney records show has climbed from less than $1 million in 1980 to $9.1 million last year, plus interest and fees for plaintiffs' lawyers. The council also wants to determine whether racism is a factor in the excessive force cases and whether officers involved in costly lawsuits have been disciplined.

"In most companies if you make an error that costs a company that much, you would be fired," said Councilman Zev Yaroslavsky, who heads the Budget and Finance Committee. "It's outrageous the amount of money we are shelling out."

Last year, lawsuits against police represented more than 40% of the $25

million in city payouts for civil suits, according to the city attorney's office. A decade ago, the portion was 25%.

New York spent $10.6 million over the last fiscal year to clear 267 suits against officers in the 26,000-member department, said attorney Len Olarsch, who heads New York's litigation division.

A Brooklyn jury awarded $76 million to two men who were shot at and beaten by five officers before being charged with attempted murder. Because that case is on appeal, the award--believed to be the highest in the nation last year--was not included in New York City statistics, Olarsch said.

In Chicago, the nation's third most populous city behind New York and Los Angeles, a spokeswoman for the city's law department said the cost of 170

settlements and judgments from police-related lawsuits last year was about $5.9 million.

In recent years, Detroit, the seventh most populous city, has averaged about $10 million a year in payouts for suits against police--roughly the same as New York. But officials said that the amount increased to $20 million in 1990.

Detroit City Councilman Mel Ravitz, who compiled the figures, said the $20 million represented 200 payouts stemming from the "misbehavior of a relatively small number of police officers."

City officials said Thursday that they could not explain why the total was nearly double that of previous annual figures, but they noted that Wayne County juries have a history of giving high awards.

Phil Shiner, Los Angeles assistant city attorney, was surprised that the city's payouts in 1990 were higher than most other cities, but he cautioned against drawing a conclusion that police misconduct is occurring more frequently here.

"Maybe if we had 26,000 officers (like New York City), the police would get better compliance from suspects and maybe if we had 26,000 officers we wouldn't be spending the large amounts we do on lawsuits," Shiner said.

The police totals include suits alleging excessive force, false arrests, wrongful deaths, civil rights violations, negligence and other misconduct, but not routine traffic accidents. Of the 32 cases in which the city made payouts last year, eight involved police shootings and

13 suits alleged excessive physical force such as beatings.

The Los Angeles County Sheriff's Department last year resolved 131 lawsuits at a cost of about $5.4 million, said Robert Ambrose, assistant county counsel, who noted that two shooting cases accounted for $1.5 million.

The increasing cost of police litigation in the city of Los Angeles can be traced to a change in attitude on the part of jurors, said **RICHARD M. HELGESON, an assistant city attorney** in charge of appeals. "If you trip and fall and break your arm, a jury might award you $35,000, but if your arm is broken by a police officer putting handcuffs on you, you can bet it's a six-figure settlement," he said. **"THE JURY CAN RETALIATE."**

Helgeson pointed to the case of

Murphy Pierson, a 70-year-old homeowner who last year received a $1.8-million settlement of his suit stemming from a police shooting in 1985.

"Normally, juries don't award a settlement that high for someone that old . . . it is not like it was a little kid and looking at 50 to 60 years left to live," Helgeson said. "That jury award was big because they were angry and there was bad judgment on the part of the officers."

Pierson was wounded by police as he stood, shotgun in hand, on his front porch after he had just chased two drug dealers from his property. Two police officers said Pierson was shot after he ignored repeated warnings to drop his shotgun and pointed the weapon at them. They fired 11 shots, striking Pierson in

the right hand, the left buttock and the chest.

"They never gave him a chance to put down the gun," said attorney Johnnie L. Cochran, who represented Pierson. "They continued firing after Pierson was lying on the porch begging them to stop. Then they pulled his wife out of the house in her housecoat and made her kneel down on the front lawn and handcuffed her and took her to jail."

Pierson died last year from complications resulting from the shooting, his wife, Katie Pierson, said. "It was only after the shooting that he started having problems," she said. "We would have been married 50 years."

In a suit stemming from a 1981 incident, the city paid $1.45 million to Ronnie Melgar, 20, a burglary suspect who

was shot while fleeing police and suffered brain damage. Police apparently mistook Melgar's flashlight for a gun.

A police officer said he chased Melgar on foot from a construction site where it was suspected he was stealing lumber, according to police reports. The police officer said he repeatedly ordered Melgar to halt and fired his weapon only after he thought the suspect was preparing to turn and point a gun at him. The officer's bullet hit Melgar in the back, causing his lung to collapse and resulting in brain damage. Melgar's attorney, Barry Litt, said his client ran only after the officer used a racial epithet and threatened to hit Melgar with a baton.

The city also paid $625,000 into a lifetime annuity for two sons of RTD bus

driver Danny Smith, 34, who was shot in 1985 by officers who were searching for a suspect in Smith's back yard. Smith was unarmed, according to a summary of the incident in city Budget and Finance Committee reports. Several police officers went to Danny Smith's back yard looking for a man who was wanted for receiving stolen merchandise. Smith was shot, the officers said, only after they heard the "cocking of a weapon" and Smith ignored orders to freeze. Smith was shot in the back.

Will Glennon, a legal analyst for the California Trial Lawyers Assn., said the large increases in awards and settlements reported in Los Angeles were not consistent with the trend elsewhere in the state. "Mostly jury awards have been flat," he said. "If (police-related

lawsuits) are showing an increase, then that's pretty frightening. . . . It's probably only the tip of the iceberg because police cases are very tough. The cops usually have all the (juror) sympathies on their side."

As large as payouts were last year, city attorneys said that it will become increasingly difficult to litigate lawsuits involving the police.

Noting that the publicity surrounding the King beating will tend to influence jurors, Assistant Dist. Atty. Richard James said he plans to ask a judge to continue one of his current police cases. "I don't think a police officer is going to get a fair trial now," he said.

The city attorney's office frequently settles civil suits before

trial to avoid the possibility of large jury awards and costly litigation.

Most cases that go to trial, however, are won by the city. Out of 78 cases tried last year, the city won 61, officials said. Another 85 cases were settled without trial, sometimes to avoid costly litigation or the possibility of an unfavorable jury verdict.

One of them was a suit over the 1985 police shooting death of Francisco Gutierrez. According to a City Council report, a police officer who shot Gutierrez thought his starter's pistol was a real gun. But Gutierrez's family said he did not have a starter's pistol.

The Budget and Finance Committee recommended council approval of the $35,000 settlement, saying: "A jury possibly might decide that the

plaintiff's version of the facts were true and that the officers shot a man who did not hold a starter pistol, or that there was negligence in the tactical approach which led to the shooting. Such a determination would result in a verdict far in excess of the proposed settlement amount."

Attorney Cochran, who has handled excessive force cases for three decades, said "the weight of all the cases over the years has sensitized people and raised questions in their minds about whether police always tell the truth."

Attorney Stephen Yagman, who also handles many police-abuse cases, said he doubts that there has been a significant change in the positive attitudes that jurors have toward the police. "It is very, very difficult to shake," he said.